No. 14521

IN THE

United States Court of Appeals

For the Ninth Circuit

PANTHER OIL & GREASE MANUFACTURING COMPANY, a Corporation,
Appellant,

vs.

JOHN NORMAN SEGERSTROM, as administrator of the Estate of H. N. Segerstrom, deceased,
Appellee.

No. 14521

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division

HON. SAMUEL M. DRIVER, *Judge*

APPELLEE'S BRIEF

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INDEX

TABLE OF CASES

RULES

STATUTES

TEXTS

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JURISDICTION

Appellee agrees with the statement contained in appellant's brief as to the jurisdiction of the District Court and the jurisdiction of this Court to review the judgment.

STATEMENT OF THE CASE

With one exception, appellant's position on this appeal is that the District Judge should have directed

a verdict in its favor because (1) appellant claims that there was no evidence of negligence on the part of appellant, and (2) appellant claims that plaintiff/appellee was contributorily negligent as a matter of law. It is elementary that in considering these two contentions the evidence is to be viewed in the light most favorable to appellee and appellee is entitled to all reasonable inferences which can be drawn. Notwithstanding this, appellant's statement of the case only states the evidence favorable to appellant and completely ignores the evidence on the basis of which the District Judge correctly ruled that issues of fact were presented for the determination of the jury, both as to negligence and contributory negligence. Also, appellant's brief contains many erroneous statements as to the facts, which are too numerous to deal with individually. We are therefore taking the liberty of making a full statement of the facts which clearly warranted the submission of the case to the jury.

Plaintiff/appellee, John Norman Segerstrom, as administrator of the Estate of H. N. Segerstrom, deceased, operated a large apple orchard property near Spokane, comprising about 440 acres (Tr. 55). On the land was a packing and cold storage building approximately 550 feet in length and 50 feet in width, which was used for the handling of the yearly crop (Tr. 56). The packing house portion of the building was constructed over 30 years ago, but the cold storage section was constructed in 1947 and was modern in every respect, having concrete floors throughout, concrete block walls 18 feet in height, and a trussed

arch-type roof with no center supports (Tr. 62, 69, 72, Ex. 20). The entire building and contents were largely destroyed by an explosion and fire on July 8, 1953, and this suit was brought by Segerstrom against appellant, Panther Oil & Grease Manufacturing Company, to recover for the loss sustained (Tr. 56).

The facts upon which the liability of appellant for this fire damage are based and which were proved upon the trial are the following:

About March 20, 1953 a Mr. Brynildson, representing appellant oil company, called at Mr. Segestrom's home and inquired as to whether the cold storage building was in need of re-roofing (Tr. 57). Mr. Segerstrom was not acquainted with either Mr. Brynildson or the Panther Company, but it happened that he did contemplate re-roofing the building (Tr. 57). Thereupon, Mr. Brynildson solicited Mr. Segerstrom to purchase appellant's product, Battleship Liquid Asbestos Roof Coating (Tr. 57). Mr. Brynildson stated at the time that the roofing could be applied by any amateur and did not require skilled labor (Tr. 58). As a result of the conversation, Mr. Segerstrom signed an order for 325 gallons of the roof coating and also ordered 162 gallons of another product, Battleship Primer, because Brynildson stressed the need of using a primer prior to applying the roof coating (Tr. 57). Nothing was said by Brynildson at this time as to any hazard connected with the use of the material or that it might be subject to explosions or fire, or that there was any danger in heating or using the material inside a building (Tr. 58).

About a week later (March 27, 1953), appellee Segerstrom received a form letter of thanks from the Panther Company (Ex. 19) and also a pamphlet entitled "Instructions for Applying Battleship Asbestos Roof Coating" (Ex. 14). Segerstrom looked this pamphlet over upon its receipt and observed that it contained instructions only as to the roof coating and no instructions as to the application of the primer, except that it recommended that a primer coat should be used (Tr. 59). He also observed at the time the following on page 3 of the pamphlet (Ex. 14):

> "Do not heat or thin Battleship. Do not heat Battleship with an open flame. Do not thin it. *When either is done, the water-proofing qualities of Battleship are damaged. Hence, a proper job is impossible.* If, in extremely cold weather it is necessary to heat Battleship, do so by placing the drum in a warm room 72 hours before the material is to be used." (Italics ours)

This pamphlet was the only communication received by Segerstrom from the appellant company at any time prior to the fire of July 8, 1953 (Tr. 58). Segerstrom further testified that his college education consisted of a liberal arts course, that he never had any training in chemistry or engineering, that he at no time knew that either the roof coating or the primer contained asphalt or any petroleum products, that he was not aware that there was any hazard of explosion or fire about the product, and that in fact, by reason of the word "asbestos" in the name of the product, he was led to believe that it was fireproof (Tr. 60-64).

Early in April, 1953 the Battleship Asbestos Roof Coating and Battleship Primer arrived, contained in

nine 55-gallon drums, 3 of the drums being primer (Tr. 60, 67). *None of the barrels had any warning label or instructions of any kind affixed* (Tr. 67, 68, 224). Each barrel had only one label which displayed the picture of a battleship, the name of the product and the words, "Manufactured by Panther Oil & Grease Manufacturing Company" (Tr. 67). Copies of these labels are in evidence as Exhibits 23 & 24. It was stipulated that all of the primer shipped to Segerstrom was a uniform product made according to appellant's specifications (Tr. 19, 103-104).

Despite the fact that the barrels carried no warning label of any sort, and the instruction booklet (Ex. 14) contained no warning of any explosion or fire hazard about the products, the evidence disclosed that the primer, as manufactured and sold by appellant, was a highly volatile and dangerous liquid, having flash and explosive characteristics equal to gasoline when exposed to normally experienced atmospheric conditions and temperatures (Tr. 122, 136-138, 141, 152). When the primer was at temperatures above 80° F. (its specified flash point), it would emit explosive vapors in sufficient quantity to cause explosions (Tr. 122, 138, 248). In fact, about 40% of the primer, according to appellant's own witnesses, was a petroleum distillate comparable to gasoline, and in fact gasoline, although not so called (Tr. 228, 250-252, 254, 257-258). The remaining 60% of the primer was the petroleum product known as asphalt (Tr. 198). *According to the witnesses, the primer, mixed according to appellant's own specifications, was more dangerous than straight naphtha* (Tr. 142, 256), *and equally as dan-*

gerous as gasoline in terms of hazard of flash fire or explosion at temperatures above 80° F. (Tr. 124, 141). A safer solvent of higher flash point could have been used but at greater expense (Tr. 140-141).

As before stated, the material was received by Segerstrom early in April, 1953 and at his instructions his foreman, Rhea Rosenbaum, put the barrels in the warehouse as it was not anticipated that the material would be used for re-roofing the building until the slack summer season when Segerstrom's farm employees would be without other work to do (Tr. 61). The material remained in the cold storage warehouse from early in April until July 6th, during which time the refrigeration equipment was not in operation and the inside temperature of the building, according to the experts, had long since normalized with the outside temperatures (Tr. 67, 143-144, 212-214).

On July 6th Foreman Rhea Rosenbaum decided to put his crew to the work of applying the roofing, and discussed the project that evening with Mr. Segerstrom (Tr. 68). The following morning (July 7th), Rosenbaum and his crew attempted to draw off some of the primer from the barrel to start the roof application and found that it was much too thick to use (Tr. 68). He thereupon placed the barrels of primer on a loading dock at the south side of the building where they were directly exposed to the sun's rays during the entire day of July 7th, the temperature on that day reaching 90° F. (Tr. 68, 212). The following morning, July 8th, Rosenbaum and his crew brought one of the barrels of primer inside the building for the purpose of commencing the roofing appli-

cation and again found the material too thick to apply, although it was thinner than the day before (Tr. 68-70). Thereupon, Mr. Rosenbaum concluded that it would be necessary to apply some heat to the primer in order to get it into condition so that it could be used, and he then decided to fashion a stove from a used 55-gallon barrel over which the material could be heated (Tr. 70-71). He proceeded to make such a stove, a drawing of which is in evidence as Exhibit 21, and this stove was placed in the exact middle of the main storage room in the cold storage building, and after building an apple wood fire in the stove and permitting it to burn down to coals, the primer was drawn from the barrel into 5-gallon pails, 2 of which at a time were placed on angle iron supports over the opening in the top of the stove (Tr. 71-72).

The reason why Rosenbaum decided to conduct the heating inside the building was that it was more convenient, as the only access to the roof where the material was to be used was by means of an opening or manhole extending to the roof through the ceiling of this room (Tr. 69, 73). The room was empty, was 50 feet x 160 feet in dimensions, had a concrete floor, the walls and ceiling were tongue and groove, and the ceiling was 18 feet above the floor (Tr. 69, 72, 74, Ex. 20). This room and the building otherwise had many doors 6 feet or more in width, all or substantially all of which were open (Tr. 69, Ex. 20). The stove was placed in about the exact center of the room, which meant that it was 25 feet from the nearest wall, except for concrete walls enclosing a small compressor room which abutted into the main room (Tr. 72, 69).

Rosenbaum testified that he know that this primer was a petroleum product but had no idea that it was of an explosive nature. He only felt that it would burn if it came in direct contact with fire and would then only result in a fire of minor proportions which could not possibly involve the walls or ceiling of the room because of its huge size; and overall he felt there was no danger to the building in what he was doing (Tr. 71, 73, 74, 84, 86). He assigned one of the crew, Tom Woods, to place the buckets over the stove and cautioned him not to spill any of the material and to keep the fire in a state of coals (Tr. 72, 84). Also Rosenbaum had previously observed, as all of us have, that roofing materials are commonly heated over fires by professional roofing crews prior to application, and he stated that this is where he got the idea (Tr. 70, 86).

The heating of the primer in the foregoing fashion commenced about 8:30 or 9:00 a.m. on July 8th and continued steadily and without incident until noon (Tr. 73, 90). The procedure followed by Tom Woods was to place two buckets of the primer on the stove and test the material with his finger until it was warm and had thinned somewhat, which would take 10 or 15 minutes, and he would then hoist the buckets to the roof by means of a rope, where the material would be spread by two other members of the crew (Tr. 89). In this fashion by noon the majority of one barrel of the primer was used (Tr. 90). None of the material ever spilled or dripped on the floor (Tr. 74, 90-91).

The crew ceased work from noon until 12:30 p.m., during which time a member of the crew remained

in the room to watch the stove at the direction of Foreman Rosenbaum, the other members of the crew going to their nearby homes to lunch (Tr. 73, 90, 96). No wood was added to the fire during the lunch period or thereafter until the disaster occurred, and there were only coals and no flame in the stove (Tr. 90, 91, 97). Also, no buckets were on the stove during the lunch period (Tr. 90, 97).

At 12:30 p.m. Tom Woods and the remainder of the crew returned, and Woods placed 2 buckets on the fire, the one to the rear of the stove being less exposed to heat (Tr. 91). After about 10 or 15 minutes Woods took the front bucket to the roof, returned and tested the other bucket and found that it was warm and seemed to be about ready for application (Tr. 91). He thereupon started toward the barrel of primer to draw another bucket, the barrel being located some 30 feet away at the south wall (Tr. 91). While proceeding towards the barrel, with his back to the stove, he heard an exceedingly loud sound which he described as "a great big Whoosh," a sound such as he had never heard before, and upon turning around he observed the entire ceiling of the huge room in flames, billowing downward (Tr. 91-92). At this time, there was no fire coming off the bucket or stove, or from the floor, and none of the material had ever been spilled on the floor (Tr. 91-92).

Another witness, Ira Hoskinson, at the same time was driving a car from the west toward the building, directly in line with the large doors which were open, so that he was looking directly into the room in question, and he stated that he suddenly saw a huge flash,

lighting up the entire interior of the building in a crimson, fiery orange color (Tr. 101-102). The explosion and fire just described quickly involved the entire building and substantially destroyed it, despite the efforts of the rural fire department which was summoned (Tr. 56, 74, 102-103). Witnesses for both appellant and appellee conceded that what had occurred was that the primer, by reason of its flash point of about 80° F., had been emitting gas vapors into and throughout the huge room, and that when these vapors became concentrated with the air in the room in a ratio of about 3 parts gas vapor to 100 parts air, a so-called explosive mixture came to exist in the room, which was caused to explode from some spark, either about the barrel stove or elsewhere in the room, that this initial explosion was instantly followed by a rapid burning or explosion of all the dust about the walls and ceiling of the room, all of which caused intense heat and a rapid spread of the fire throughout the building (Tr. 153-154, 160, 224). What Woods saw on turning around was not the initial gas explosion, but the ensuing dust fire (Tr. 154). It was conceded by all of the experts that the primer itself did not ignite, but only the invisible, insidious gas vapors which had been emanating from it (Tr. 154, 160, 224).

Foreman Rosenbaum, Tom Woods and appellee Segerstrom all testified that they had no prior knowledge that material of this sort, even when heated, was subject to giving off any such explosive gas vapors (Tr. 60, 67, 71, 74, 92). None of the crew detected any tell-tale odor from the primer (Tr. 74, 92, 98).

All of the experts testified that flash point is a measure of the explosive hazard of a petroleum product and indicates the temperature at or above which the material is emitting gas vapors in sufficient quantity to cause an explosion (Tr. 109-110, 122, 137-138, 224-225, 248-249). Furthermore, the experts, J. M. Kniseley, Leonard L. Bergunder and James G. McGivern, all testified that it was the custom of prudent manufacturers as to any products having flash points below 100° F. to affix to the container a suitable red warning label, and even as to products having flash points between 100 and 150° F., the custom was to affix some warning such as to not heat, or get close to an open flame, and to use in a well-ventilated room (Tr. 122, 141-142, 161). They further testified that such warning labels were necessary when the flash point, as with this material, was within the range of normally experienced atmospheric temperatures (Tr. 132, 153).

Exhibits 77, 78, 79 and 80 are cans containing similar roofing primer of four reputable manufacturers which were purchased in the open market in Spokane. Exhibit 77 was Johns-Manville Regal Roof Coating which had a flash point of 116° F. and had the following prominently on its label, "Keep away from open fires" (Tr. 287). Exhibit 78 was Pioneer-Flintkote Asbestos Roofing Coat which had a flash point of 136° F., and on this can in capital letters appeared the following: "DO NOT HEAT OVER DIRECT FIRE" (Tr. 287). Exhibit 79 was Celotex Asphalt Roof Coating which had a flash point of 85° F. and on the label of which in capital letters ap-

peared, "CAUTION: DO NOT HEAT NEAR FIRE" (Tr. 287). Exhibit 80 was a product called "Dri-N-Tite, The Modern Method of Roof Resurfacing, Primer Black," and had a flash point of 130° F. and on its label prominently appeared, "Caution: Keep Away From Open Flame and Use in a Well-Ventilated Place" (Tr. 288).

The evidence established that the primer when opened by Foreman Rosenbaum was much thicker than when manufactured, and it appeared that it was a characteristic of this type of material that it sometimes jelled in the barrel (Tr. 203, 232, 254). Appellant's assistant vice-president and research director, Ralph Uhrmacher, testified that it was known to him and his company that this material was subject to this jelling tendency after manufacture and that the primer might have been in its thickened condition when received by Segerstrom (Tr. 232). Appellant's expert, Homer Schauer, also testified as to the same jelling tendency of this type of product and stated that it occurred when asphalt was thinned or diluted with gasoline (Tr. 254). Elsewhere in Mr. Schauer's testimony, it appears that Battleship Primer as manufactured is diluted with what amounts to gasoline, although not so called (Tr. 250-258).

Appellee Segestrom in originally instituting this suit charged both breach of warranty and negligence in failing to warn. Subsequently, the allegations of breach of warranty were abandoned and the case proceeded to trial upon the charge of negligence of the

manufacturer, Panther Oil & Grease Manufacturing Company.

On the trial, the District Judge instructed the jury as to §70.74.300 of the Revised Code of Washington (appellant's Specification of Error III), upon the basis of the testimony that the Battleship Primer in its entirety was more explosive, combustible and dangerous than some of the straight naphthas, naphtha being a generic term embracing petroleum distillates with flash points ranging from 0° F. to 140° F. (Tr. 142), and also on the basis of testimony that, when over its flash point temperature, the primer was as dangerous as gasoline as to the hazard of flash fire or explosion (Tr. 141).

The trial of the cause resulted in a verdict and judgment in the sum of $111,035.00, from which this appeal has been taken by defendant Panther Company.

APPELLANT'S SPECIFICATIONS OF ERROR

We call attention to appellant's Specification of Error III dealing with the Court's instruction on §70.74.300 of the Revised Code of Washington and particularly direct attention to appellant's statement at this point as to the exception taken to this instruction (App. Br. p. 15). In this connection we respectfully refer the Court directly to the record as to the exception taken to this instruction by appellant (Tr. 316-318). The reasons then and there assigned for the exception were only the following: That the statute is intended to, and does apply only to the items

mentioned when they are in an unadulterated condition; that the statute is no longer in effect; that there is a later statute covering the handling of explosives and defining explosives, being Chapter 111 of the Laws of 1931 (Revised Code of Washington §70.74.010), and that the substance in question is not within that statutory definition; and that the statute does not properly apply to the sale of roofing primer intended for application to an exterior surface of a building.

These reasons have now been abandoned and appellant's present arguments directed at this instruction are entirely after-thoughts.

SUMMARY OF ARGUMENT

1. Appellant Panther Company, though not the actual manufacturer of the primer, is liable as though it were the manufacturer, since it sold the product as manufactured by it. The evidence established beyond dispute that the primer, as manufactured according to appellant's own specifications, is an inherently dangerous product, imposing upon appellant company the positive duty to give adequate warning to the public of the inherent danger. This duty appellant wholly failed to fulfil, either by labels on the containers, or otherwise, the language contained in its instruction booklet being in fact an indirect representation of safety. Appellant admittedly knew that the primer sometimes thickened after manufacture and that, absent a warning, someone might attempt to heat it. Clearly, therefore, appellant was guilty of negligence in failing to warn.

2. Appellant's failure to warn was the proximate cause of the explosion and fire, or at least, the issue of proximate cause was for the jury. Appellee's employees testified unequivocally that, had there been a warning label on the barrels, they would not have heated the primer as they did.

3. Appellee Segerstrom and his employees were not contributorily negligent, or at least that issue was also for the jury. Appellee and his employees all testified that they had no knowledge or reason to believe that the primer was a dangerous substance or that, by heating it, explosive vapors would be emitted from it. Furthermore, appellant's literature stated that the material could be applied by unskilled labor, and appellee's employees were in that category, with a layman's ignorance of the chemical characteristics of the primer.

4. The District Judge did not err in giving the instruction regarding Revised Code of Washington §70.74.300. That statute is not obsolete, and there is no evidentiary basis for so contending; it has been included in all codifications of the laws of the State of Washington, including the 1951 Code. The statute is not ambiguous and required no judicial construction; appellee's theory and arguments as to the instruction were wholly consistent with the construction required by the rule of *ejusdem generis*; and appellant did not request the District Judge at any time to construe the statute for the jury. The words "or other explosive or combustible substance" include any substance having a hazard comparable to the stated substances; the evidence established that the primer

in its entirety was at least equally as hazardous as certain of the stated substances, and this was the sole basis on which the matter was argued to the jury. No contention was ever made to the jury that the primer was within the statute because it contained a percentage of gasoline; our whole position was that the product as a whole was as hazardous as gasoline and more hazardous than naphtha. Furthermore, the reasons assigned against this instruction by appellant in its brief should not be considered by this Court because the arguments now advanced were not stated to the District Judge in support of the exception taken to this instruction.

ARGUMENT IN SUPPORT OF THE JUDGMENT

The only two issues of fact upon the trial of this case were the negligence of appellant Panther Oil & Grease Manufacturing Company and the claimed contributory negligence of appellee or his employees.

1. Negligence of Panther Oil & Grease Manufacturing Co.

Although the Battleship Primer in question was actually manufactured by Sandard Oil Company at Casper, Wyoming, it was sold as the product of appellant and the label bore the words "Manufactured by Panther Oil & Grease Manufacturing Co." Under these circumstances appellant is liable as though it were the manufacturer.

Restatement of the Law of Torts, §400, p. 1086;
22 Am. Jur. 195, Explosions §71, Note 3;
46 Am. Jur. 942, Sales §817, Note 20.

It is the duty of one who manufactures an inherently dangerous product for sale to the public to give warning of the danger inherent in the product, and such manufacturer is liable for damages because of injury to person *or property* proximately caused by his failure so to warn.

Restatement of the Law of Torts, §397, pp. 1081-1083;

22 Am. Jur. 195, Explosions §71;

Tingey vs. E. F. Houghton & Co. (Calif.), 179 Pac. (2d) 807, 811;

Standard Oil Co. vs. Lyons (8th C.A.), 130 Fed. (2d) 965;

Gennessee Relief Assoc. vs. Sonneborn (N.Y.), 189 N.E. 551;

Weiser vs. Holzman, 33 Wash. 87, 73 Pac. 797;

Theurer vs. Condon, 34 Wash. (2d) 448, 461; 209 Pac. (2d) 311, 318.

This primer was an inherently dangerous product.

46 Am. Jur. 939, §815, Note 17.

The warning must be adequate, and an inadequate warning is in legal effect no warning.

56 C.J.S. 1053, §290, Note 49;

Fidelity Trust Co. vs. Wisconsin Iron Works (Wis.), 129 N.W. 615, 618;

Sadler vs. Lynch (Va.), 64 S.E. (2d) 664, 666;

McClanahan vs. Calif. Spray Co. (Va.), 75 S.E. (2d) 712, 718.

If the manufacturer has reason to believe that the inherently dangerous product may be used by someone other than the immediate purchaser, the duty to

warn can only be fulfilled by affixing a label to the container itself.

> Restatement of the Law of Torts, §397, p. 1082 (Comment b).

It could scarcely be challenged that this Battleship Primer, as manufactured, was an inherently dangerous product and that the purchasing public was entitled to be warned thereof. Appellant's own specifications for the manufacture of the product, Exhibit 25, permitted its manufacture with a flash point as low as 80° F. (Tr. 104-105). The records of the actual manufacturer, Standard Oil Company, show that, as manufactured, the material had flash points ranging from 85° to 100° F. (Ex. 63, Tr. 257). The tests made on the actual primer delivered to Mr. Segerstrom, one barrel of which escaped the fire, yielded flash points ranging from 81° to 91° F. (Tr. 111, 122, 136).

By distilling off the 40% solvent portion of the primer, the entire solvent was found to have a flash point of 57° F., and portions of the solvent were found to have flash points below 0° F. (Tr. 111, 123-124). This primer is a mixture, not a compound, and the characteristics of each portion of the mixture, including the solvent, continue into the mixture (Tr. 121, 138). The expert witness Kniseley testified that the entire primer was as dangerous as the solvent portion alone, and that this primer was more hazardous than its flash point would indicate because of the presence in the mixture of extremely light, volatile fractions (Tr. 124, 136, 139).

Appellant's witness, Homer Schauer, a chemical engineer at the Standard Oil Company refinery where the product was made, testified that the 40% solvent portion of the primer came from the second still in the chain of six stills through which the crude petroleum is refined. The first still takes off the very lightest, most volatile parts of the crude, including the true gases, and also the pentanes and butanes which are gases but can be compressed into liquid. The product of the second still, which at times is used in the manufacture of this primer and similar products, otherwise is used to make gasoline (Tr. 250-259). In order to make the product of the second still into gasoline, it is necessary to improve its octane rating, and this simply means adding substances which make it ignite *less readily* (Tr. 251-252). In other words, the chief difference between the product of the second still and gasoline is that the finished gasoline ignites less readily and that winter grades of gasoline contain additives to lower the flash point into the winter range of temperatures (Tr. 251-252). Mr. Schauer declined to call the product of the second still gasoline, stating that at his refinery the term "gasoline" is only used to designate the end products actually destined as motor fuel, but the substance of his testimony is that it is gasoline nonetheless (Tr. 253-254).

In *Standard Oil Co. vs. Lyons* (8th C.A.), 130 Fed. (2d) 965, the Court was concerned with an action for wrongful death and for property damages arising out of an explosion and fire originating from gas vapors from an asphalt primer, apparently much the same as the product here involved. There, the work-

men were applying the primer inside a tank when the vapors ignited in some unexplained fashion. In affirming a judgment against the manufacturer, the Court said, among other things,

> "The asphalt primer coat sold by the defendant is a liquid containing 50% asphalt and 48% naphtha. It (believed to refer to the naphtha portion) has a flash point of about 30° F. The flash point is that temperature at which the naphtha tends to give off a gas which will flash in the presence of a flame or spark. The naphtha was the solvent in the primer. Safety solvents are those which have a flash point above 110° F., while solvents which have a flash point below 110° F. are regarded as highly inflammable and relatively dangerous. * * * It was delivered in barrels by defendant at the tank where it was being applied. The barrels contained no warning label as to danger in its use or application. The barrels had labels identifying the product as a primer coat and the name of the manufacturer. They were a muddy, dutsy red in color. * * * Defendant was the manufacturer and seller of this dangerous product. The product was so manufactured that it was ready for immediate use. It was inherently dangerous. The jury having found that the danger was not known to C. Holmquist & Co., the purchaser, nor to the plaintiff, and not being patent, it was incumbent upon the defendant to give warning of the danger in its use, if that danger could not be discovered by a reasonable inspection. * * * No representative of defendant told him that the primer or its fumes were inflammable, volatile or explosive, or that the primer contained 48% naphtha which had a flash point of less than 50° F. * * * The product, Korite Primer, was a dangerous substance, and it was the duty of the defendant to give adequate warning to plaintiffs with reference to its use in the underground tanks. The mere fact that the sub-

stance was known to contain naphtha was not, without more, sufficient warning."

See also:

Gennessee County Relief Assoc. vs. Sonneborn (N.Y.), 189 N.E. 551;

Thornhill vs. Carpenter-Morton Co. (Mass.), 108 N.E. 474, 491;

Frazier vs. Ayers (La.), 20 So. (2d) 754.

In addition to the evidence already related as to the inherently dangerous nature of the product, it is undisputed that this type of product has a known tendency to jell or thicken in the barrel at times, which tendency was known to appellant company (Tr. 232, 254). In view of this, appellant must be held to have had reason to believe that some of its purchasers would be faced with the necessity of thinning this material in some fashion before using it, and that some of such customers would resort to heat to do so. That reputable manufacturers anticipate that, as to this type of product, someone may attempt to heat it, is demonstrated by the warning labels on Exhibits 77 to 80, all saying in effect, "Do not heat or use near an open flame."

Appellant also had ample reason to anticipate that the material might be opened and used or heated inside a building. All of its literature, including Exhibits 13, 14, 15 and 62, disclose that the Battleship materials were being sold to commercial users and for large buildings. Anyone knows that access to the roofs of such buildings in many cases is through the interior. Anyone also knows that it is not uncommon nor necessarily considered hazardous to maintain open

fires for various purposes inside commercial buildings. Appellant, as the manufacturer of an inherently dangerous product, was required to anticipate the extraordinary, not the ordinary.

22 Am. Jur. 135, Explosions §14.

Appellant's salesman, in selling the product, represented to Mr. Segerstrom that it could be applied by his unskilled labor, and the literature furnished to Mr. Segerstrom in many places states, "Easily applied by unskilled labor" (Ex. 13, 14, 15, Tr. 58). Appellant was, therefore, bound to anticipate what unskilled persons, having no knowledge of the characteristics of such materials, might do. The Celotex Company, Pioneer-Flintkote Company and Johns-Manville Company certainly anticipate what some uninformed person might try to do with such products, in view of the warnings placed on their containers (Exs. 77-80).

Throughout the trial and on this appeal appellant has contended that its instruction booklet did contain a warning where it said, "Do not heat or thin Battleship. Do not heat Battleship with an open flame. Do not thin it. When either is done the water-proofing qualities of Battleship are damaged." On what basis it can seriously be contended that this constituted a warning, we fail to see. The law requires a warning *of the danger*. There is nothing here about any danger. On the contrary, this language actually amounts to an indirect representation that there is no danger, that only the water-proofing qualities will be affected by any heating. It seems

quite likely that this company placed this language in its instruction booklet, fully knowing of the danger, in an attempt to escape liability without adversely affecting the saleability of the product. Its witnesses did not explain in what respect either heating or thinning would interfere with the water-proofing qualities.

Furthermore, if the above language could be considered a warning of danger, how could a warning contained in an instruction booklet be considered adequate, where the manufacturer knew that laborers would probably be actually using the product, rather than the owner? On the basis of appellant's reasoning, if a large quantity of this primer was sold to the federal government, and an instruction booklet was sent to the President, appellant's duty to warn would be fulfilled. The place for a warning, of course, is on the barrels themselves.

Though we believe this primer should be held inherently dangerous as a matter of law, the District Judge did not so rule, but submitted the question to the jury, and this was resolved by the verdict in appellee's favor. It being inherently dangerous, the law is clear that there was a duty to warn, and there most certainly was no compliance with that duty here.

The District Judge likewise submitted to the jury the question of whether the failure to warn was the proximate cause of the damage, which also was resolved by the verdict in appellee's favor. As to this phase, Foreman Rosenbaum testified that he didn't think there was any danger in heating the material

because he hadn't seen anything on the barrels or any instructions to that effect (Tr. 73). He further specifically testified, "Had there been any printed warning on these barrels in connection with heating or exposing this material to an open flame, I wouldn't have done what I did" (Tr. 87).

We submit that the evidence most strongly supports the jury's finding of negligence on the part of appellant in failing to warn and also on the issue of proximate causation, and certainly the evidence was sufficient to carry these questions to the jury.

2. Alleged Contributory Negligence.

The record in this case is absolutely devoid of any evidence that either Mr. Segerstrom or Foreman Rosenbaum or any member of the crew knew of any danger that this product, while being heated in the fashion pursued, might cause an explosion or any fire which might communicate to and damage or destroy the building. Unquestionably Rosenbaum and others of the crew knew that the material might burn on direct contact with a fire, but their testimony is that they only considered that small flames might result, falling far short of the ceiling of the room and nowhere near the walls (Tr. 73, 84-85, 86). It should be remembered that the floor of this huge room was concrete, the entire floor area was empty, the nearest wooden wall was 25 feet from the stove, and the ceiling was 18 feet above the floor (Ex. 20, Tr. 72, 74). The majority of the large outside doors were open (Tr. 73).

Mr. Segerstrom testified that he thought the material he was purchasing was "Liquid Asbestos," that he had no knowledge that it was a petroleum product and that he had no knowledge whatever that it was dangerous in any respect (Tr. 61-62). That Mr. Segerstrom thought the material was "Liquid Asbestos" and fireproof is understandable. This manufacturer, for the purpose of influencing the public to buy its product, called it "Liquid Asbestos Roof Coating" obviously for the purpose of creating the impression that it was fireproof. In furtherance of that design, it incorporated in its instruction booklet an indirect, false representation that it was fireproof where it stated that the only consequences of heating the material would be to damage the water-proofing qualities.

Segerstrom also, on reading the instruction booklet, noted that it purported only to be "Instructions for applying Battleship Asbestos Roof Coating." Nowhere did the booklet purport to be instructions for applying the roof primer, and there were no instructions as to the roof primer in the booklet. In fact, the only reference to the roof primer throughout the booklet was a suggestion that under certain circumstances it would be advisable to use a priming coat. Therefore, Mr. Segerstrom was correct in informing Mr. Rosenbaum that he had received no instructions as to the primer.

Foreman Rosenbaum searched the barrels for any instructions or warning on the labels and found none (Tr. 67, 70, 73). Before determining to heat the

primer over the applewood coals he placed the materials for an entire day in the direct rays of a hot sun and was still faced with the necessity of further thinning the material in some manner (Tr. 68-70). He had no knowledge that the material was subject to emitting explosive vapors and only thought that it might burn with flames of small proportions upon direct contact with fire (Tr. 71). To guard against this, he directed that the fire be permitted to burn down to coals before the buckets of the material were placed over it and also directed that precautions be taken against spilling any of the material, both of which things were done by the crew (Tr. 72, 90-91, 94). He had therefore taken all necessary and reasonable precautions against any danger known to him. He further testified that had he known the material was subject to giving off explosive vapors or had there been a warning on the barrels, he would not have heated the material in the manner followed (Tr. 87). Rosenbaum categorically testified that he did not realize that there was any danger connected with what was being done (Tr. 73, 86-87).

Tom Woods, the only member of the crew having anything to do with the heating of the primer, testified that he had only an 8th grade education and had no knowledge or experience as to petroleum or asphalt, that he would not have participated in the heating of the primer if he had known that it was giving off gas vapors, that he detected nothing other than a tar smell, and that he did not at the time consider that there was any danger (Tr. 92-93).

Neither Mr. Segerstrom nor any member of the crew had any special knowledge of this type of material. The name "Battleship Primer" on the barrel gave no clue as to the character of the contents of the barrel, nor was there any tell-tale odor (Tr. 74). Had the labels even so much as informed the men that the material contained gasoline or benzine or naphtha, they would doubtless not have heated it, as such names are understood by laymen as connoting danger. On the contrary, the term "Primer" is wholly innocuous.

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We venture to say that anyone of us, including the members of this Court, possessed of no more technical knowledge than Mr. Rosenbaum, would have thought that there was no danger in heating this material in the fashion employed by these men, in view of the

vastness of the room in which it was being conducted and the concrete floor therein. It is of some significance that, when appellant's expert witness Erickson undertook to simulate the method followed in heating this primer, and for that purpose constructed a similar barrel stove and built similar fires in it, he did so inside a building and within 15 feet of wooden walls (Tr. 183, Ex. 47, 48). It will be said that Mr. Erickson only had water in the buckets over his fire, but Mr. Rosenbaum and his crew had no knowledge that the material they were heating was any more dangerous than water.

The law is clear that an essential element of contributory negligence is *an appreciation of the danger*; knowledge of the physical characteristics of a material, such as knowledge that it is a petroleum product, is not enough.

38 Am. Jur. 864, Negligence §188;
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We fail to see any basis in the evidence for any claim that Mr. Segerstrom or his employees had any reason to believe there was any danger in the heating of this primer by the method employed, and in any event the issue was for the jury and was left to the jury by the District Judge. *They did not know of the danger because they were laymen and unskilled workers; and they had not been warned of the danger by appellant.*

ARGUMENT IN ANSWER TO APPELLANT

1. The Contention that There Was No Primary Negligence (App. Br. pp. 16-20).

Appellant first suggests that the primer was designed for use on the exterior of buildings, that appellant did not intend that it should be heated inside of a building and that appellant is not liable where it was used in a manner other than intended by the manufacturer. This argument is without validity. In 46 Am. Jur. 941 it is said,

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Appellant next suggests (App. Br. p. 17) that large quantities of this material have been sold and used by the public without harm or disaster. In the first place there is no such showing in the evidence. The only evidence on the subject was the testimony of appellant's secretary and chief accounting officer, George Billingsley, that no claim on the part of any user had ever come to his attention; but he conceded on cross-examination that small claims would not come to his attention and that he would only hear about important claims, such as the one here involved (Tr. 264-265). Secondly, the mere fact that appellant com-

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The balance of appellant's argument under this contention consists of a discussion of five cases, none of which have any similarity with the facts here involved. The following are cases with similar facts where manufacturers have been held liable for damages through explosion and fire caused by similar products, because they failed to affix warning labels.

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2. Appellant's Contention as to Contributory Negligence (App. Br. pp. 21-31).

Typical of appellant's entire brief are the erroneous statements made in the course of the argument as to this contention.

On page 21 of appellant's brief it is said,

> "Plaintiff stored this primer for more than three months (from April 1 to July 8, 1953) in an insulated cold storage room, whereby the primer lost its normal fluidity."

The evidence by all witnesses is that there was no refrigeration in the building during this period, that the temperature in the room had long since normalized with the average outdoor temperature, and on July 8, 1953 the temperature of the primer in the room would have been at least 65° F. (Tr. 143-144, 213-214). Appellant also overlooks the evidence that the primer was left in the direct rays of the sun for the entire day of July 7, 1953 when the outside temperature was 90° F. Appellant also overlooks the testimony that the primer had lost its normal fluidity because it had jelled in the barrel, a tendency known to exist in this type of material (Tr. 232, 254). Appellant's vice-president, Ralph Uhrmacher, conceded that the primer remaining after the fire was too thick and that it could have been in that condition when received by Segerstrom (Tr. 203, 232).

Appellant also at page 21 of its brief reiterates its claim that the instruction circular warned against heating appellant's product. There was no such warning.

At page 23 of its brief, appellant reiterates that, during the noon hour, more applewood was fed into the drum. The testimony of Tom Woods and Elwood Rosenbaum was directly to the contrary, that no fuel was added during the noon hour and that there were only coals after lunch (Tr. 91, 97).

At pages 29-30 appellant asserts the claim that the substance equivalent to gasoline, which was determined to be in the primer by the experts who tested the barrel remaining after the fire, was not in it when manufactured, and appellant points to its evidence purporting to show that there was no possibility of gasoline getting into the primer during its manufacture. Appellant conveniently overlooks appellee's evidence which showed just as positively that no foreign substance could have gotten into the barrel of primer while it was in appellee's possession (Tr. 74-75, 82, 108, 120, 135-136, 285). It should be borne in mind that it was stipulated that the barrels of primer received by Mr. Segerstrom were the uniform product of appellant company (Tr. 19, 103-104). Contrary to appellant's contention here, its Mr. Uhrmacher admitted that gasoline might have been used as the solvent in manufacturing the primer according to the specifications (Tr. 228); and, according to other witnesses, safer solvents could also have been used but at greater cost (Tr. 141). Also, the Standard Oil Co. representative, Mr. Schauer, testified in substance that the equivalent of gasoline was used as the solvent in manufacturing the primer (Tr. 250-258). Appellant's chemists only checked one out of four of the shipments of this primer received from Standard Oil

Co. (Tr. 278). Appellant's chemist, Ralph Uhrmacher, ran complete tests on the primer remaining after the fire, and the only difference he detected from appellant's uniform product was a much greater viscosity (Tr. 217). Furthermore, all of the testimony concerning gasoline in the primer was a play on words, as appellant's specifications for the primer admittedly called for an inherently dangerous product with the equivalent of gasoline as its solvent. The effect of these two lines of evidence was simply to create an issue of fact for the jury.

In the examples just cited, as elsewhere in its brief, appellant is relying upon the version of the facts most favorable to it and is wholly disregarding the conflicting evidence favorable to appellee which created the issues of fact properly submitted to the jury.

At page 29 of its brief appellant asserts that plaintiff's theory was entirely upon the basis that the primer contained gasoline. Nothing could be further from the truth. Our experts simply identified certain of the contents of the primer as being substantially gasoline. Our position was and is that, irrespective of the name by which it is called, the primer as manufactured according to appellant's own specifications was an inherently dangerous and hazardous material as to which the buying public was entitled to be adequately warned. We identified a portion of the primer as gasoline only to dramatize for the lay persons on the jury the dangerous nature of this material.

Overall, appellant's theory on the subject of contributory negligence is that Mr. Segerstrom's employees knew that it was dangerous to heat the ma-

terial inside a building. The evidence on this subject is directly to the contrary. None of the employees was aware of the dangerous characteristics of this material which resulted in the disastrous explosion.

This case is comparable to the kerosene cases, in which it has repeatedly been held that it is not contributory negligence as a matter of law to use kerosene to kindle fires inside buildings.

Ellis vs. Republic Oil Co. (Iowa), 110 N.W. 20;

Chapman vs. Deep Rock Oil Co. (Ill.), 77 N.E. (2d) 883;

Douglas vs. Daniel Bros. Oil Co. (Ohio), 22 N.E. (2d) 195;

Frazier vs. Ayres (La.), 20 So. (2d) 754, 761;

Waters-Pierce Oil Co. vs. Deselms, 212 U.S. 159, 53 L. ed. 453.

Also appellant asserts, as we understand it, that the proximate cause of the disaster was the action of the crew in heating the material. If this were the case, no manufacturer could ever be held liable for a failure to affix warning labels, as the damage is always brought about by the subsequent act of some member of the public which, viewed in retrospect, can be characterized as foolhardy or careless. The truly proximate cause of this disaster was the failure of appellant to affix warning labels in accordance with its duty. Could anyone doubt that, had there been such a warning label on these barrels, this property loss would not have occurred? In any event, the issue of proximate cause and also the issue of contributory negligence were clearly for the jury.

3. Appellant's Contention as to the Instruction Dealing with §70.74.300 of the Revised Code of Washington (App. Br. pp. 31-44).

Appellant lodges the following complaints against the instruction in question: (a) The Court should have interpreted the statute for the jury, the interpretation of the statute being a matter for the Court and not for the jury; (b) this being a criminal statute it is to be strictly construed and not extended beyond its plain terms; (c) under the rule of *ejusdem generis* a roof or paint primer or coating is not within the terms of the statute; (d) the statute has never been treated by the law enforcement officers of the state as applicable to roof or paint primers or coatings. Before discussing these four contentions, we again point out that no one of these contentions was stated to the trial Judge in support of the exception taken to this instruction at the close of the trial (Tr. 316-318). It is well settled that only such reasons as are stated in taking exception to instructions in the trial Court can be urged on appeal.

> *Capital Transit Co. vs. Compton* (8th C.A.), 187 Fed. (2d) 844, 847;
>
> *W. T. Grant Co. vs. Karren* (10th C.A.), 190 Fed. (2d) 710, 712.

Rule 51 of the Federal Rules of Civil Procedure in part provides:

> "No party may assign as error, the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Without waiving the foregoing, we will now discuss each of the above objections separately.

a. Statutory Interpretation for the Court (App. Br. pp. 32-34).

We quite agree with appellant that the interpretation of ambiguous statutes is for the Court. However, there is no ambiguity about this statute. It is obvious, even to a lay person, that the language "or other explosive or combustible substance" refers only to other substances equally as hazardous as benzine, gasoline, naphtha, nitroglycerine, dynamite or powder. Furthermore, that is the sole basis upon which the statute was argued to the jury by appellee's counsel. The evidentiary basis for this instruction was the testimony of the expert witnesses that this entire primer was more dangerous than straight naphtha, and equally as subject to flash fire or explosion as gasoline when above its flash point, naphtha and gasoline being two of the specifically named substances required by the statute to be labeled "Explosive." Our entire argument on the subject to the jury was to the effect that the primer was required to be labeled because in its entirety it was more dangerous than naphtha, and equally as hazardous as gasoline on warm days. We at no time contended to the jury that because the primer may have contained percentages of gasoline or naphtha it was within the statute.

Appellant's present argument was first urged upon the trial Court at the hearing on the motion for new trial. In denying the motion, the Court recognized

what we have said as to the nature of our argument to the jury, where the Court said,

> "And if I had it to do over again — of course hindsight is always better than foresight or one's judgment during the heat and rush of a jury trial — I would have instructed that the jury must find that the roof primer was of substantially similar character to the naphtha or gasoline specifically mentioned, but that was the basis on which the case was argued and, if there had been any argument to the contrary, that any combustible material would have to be labeled regardless of whether it were similar to or equally as dangerous as naphtha or gasoline mentioned in the statute, I certainly would have instructed the jury, but I didn't do so because the question didn't seem to be raised or the jury misled as to the application of the statute." (Tr. 325).

Elsewhere, appellant suggests that its counsel were "surprised and disappointed" at the giving of this instruction. We are unable to account for their surprise. Our contention that this primer should have been labeled in accordance with the provision of R. C.W. 70.74.300 was embraced in the pre-trial order (Tr. 21). The pre-trial order was entered April 1, 1954 and the trial of the case did not commence until April 26, 1954. Early in the trial, we submitted to the Court our requested instructions, among which was the instruction in question. During the forenoon of May 7, 1954, the trial judge advised counsel that he was going to give the requested instruction on the statute (Tr. 291-296). In the afternoon, there was further lengthy discussion between Court and counsel on other legal matters, followed by arguments to the jury, and it was not until late afternoon of May

because he hadn't seen anything on the barrels or any instructions to that effect (Tr. 73). He further specifically testified, "Had there been any printed warning on these barrels in connection with heating or exposing this material to an open flame, I wouldn't have done what I did" (Tr. 87).

We submit that the evidence most strongly supports the jury's finding of negligence on the part of appellant in failing to warn and also on the issue of proximate causation, and certainly the evidence was sufficient to carry these questions to the jury.

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At page 23 of its brief, appellant reiterates that, during the noon hour, more applewood was fed into the drum. The testimony of Tom Woods and Elwood Rosenbaum was directly to the contrary, that no fuel was added during the noon hour and that there were only coals after lunch (Tr. 91, 97).

At pages 29-30 appellant asserts the claim that the substance equivalent to gasoline, which was determined to be in the primer by the experts who tested the barrel remaining after the fire, was not in it when manufactured, and appellant points to its evidence purporting to show that there was no possibility of gasoline getting into the primer during its manufacture. Appellant conveniently overlooks appellee's evidence which showed just as positively that no foreign substance could have gotten into the barrel of primer while it was in appellee's possession (Tr. 74-75, 82, 108, 120, 135-136, 285). It should be borne in mind that it was stipulated that the barrels of primer received by Mr. Segerstrom were the uniform product of appellant company (Tr. 19, 103-104). Contrary to appellant's contention here, its Mr. Uhrmacher admitted that gasoline might have been used as the solvent in manufacturing the primer according to the specifications (Tr. 228); and, according to other witnesses, safer solvents could also have been used but at greater cost (Tr. 141). Also, the Standard Oil Co. representative, Mr. Schauer, testified in substance that the equivalent of gasoline was used as the solvent in manufacturing the primer (Tr. 250-258). Appellant's chemists only checked one out of four of the shipments of this primer received from Standard Oil

Co. (Tr. 278). Appellant's chemist, Ralph Uhrmacher, ran complete tests on the primer remaining after the fire, and the only difference he detected from appellant's uniform product was a much greater viscosity (Tr. 217). Furthermore, all of the testimony concerning gasoline in the primer was a play on words, as appellant's specifications for the primer admittedly called for an inherently dangerous product with the equivalent of gasoline as its solvent. The effect of these two lines of evidence was simply to create an issue of fact for the jury.

In the examples just cited, as elsewhere in its brief, appellant is relying upon the version of the facts most favorable to it and is wholly disregarding the conflicting evidence favorable to appellee which created the issues of fact properly submitted to the jury.

At page 29 of its brief appellant asserts that plaintiff's theory was entirely upon the basis that the primer contained gasoline. Nothing could be further from the truth. Our experts simply identified certain of the contents of the primer as being substantially gasoline. Our position was and is that, irrespective of the name by which it is called, the primer as manufactured according to appellant's own specifications was an inherently dangerous and hazardous material as to which the buying public was entitled to be adequately warned. We identified a portion of the primer as gasoline only to dramatize for the lay persons on the jury the dangerous nature of this material.

Overall, appellant's theory on the subject of contributory negligence is that Mr. Segerstrom's employees knew that it was dangerous to heat the ma-

terial inside a building. The evidence on this subject is directly to the contrary. None of the employees was aware of the dangerous characteristics of this material which resulted in the disastrous explosion.

This case is comparable to the kerosene cases, in which it has repeatedly been held that it is not contributory negligence as a matter of law to use kerosene to kindle fires inside buildings.

Ellis vs. Republic Oil Co. (Iowa), 110 N.W. 20;

Chapman vs. Deep Rock Oil Co. (Ill.), 77 N.E. (2d) 883;

Douglas vs. Daniel Bros. Oil Co. (Ohio), 22 N.E. (2d) 195;

Frazier vs. Ayres (La.), 20 So. (2d) 754, 761;

Waters-Pierce Oil Co. vs. Deselms, 212 U.S. 159, 53 L. ed. 453.

Also appellant asserts, as we understand it, that the proximate cause of the disaster was the action of the crew in heating the material. If this were the case, no manufacturer could ever be held liable for a failure to affix warning labels, as the damage is always brought about by the subsequent act of some member of the public which, viewed in retrospect, can be characterized as foolhardy or careless. The truly proximate cause of this disaster was the failure of appellant to affix warning labels in accordance with its duty. Could anyone doubt that, had there been such a warning label on these barrels, this property loss would not have occurred? In any event, the issue of proximate cause and also the issue of contributory negligence were clearly for the jury.

3. Appellant's Contention as to the Instruction Dealing with §70.74.300 of the Revised Code of Washington (App. Br. pp. 31-44).

Appellant lodges the following complaints against the instruction in question: (a) The Court should have interpreted the statute for the jury, the interpretation of the statute being a matter for the Court and not for the jury; (b) this being a criminal statute it is to be strictly construed and not extended beyond its plain terms; (c) under the rule of *ejusdem generis* a roof or paint primer or coating is not within the terms of the statute; (d) the statute has never been treated by the law enforcement officers of the state as applicable to roof or paint primers or coatings. Before discussing these four contentions, we again point out that no one of these contentions was stated to the trial Judge in support of the exception taken to this instruction at the close of the trial (Tr. 316-318). It is well settled that only such reasons as are stated in taking exception to instructions in the trial Court can be urged on appeal.

> *Capital Transit Co. vs. Compton* (8th C.A.), 187 Fed. (2d) 844, 847;
>
> *W. T. Grant Co. vs. Karren* (10th C.A.), 190 Fed. (2d) 710, 712.

Rule 51 of the Federal Rules of Civil Procedure in part provides:

> "No party may assign as error, the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Without waiving the foregoing, we will now discuss each of the above objections separately.

a. Statutory Interpretation for the Court (App. Br. pp. 32-34).

We quite agree with appellant that the interpretation of ambiguous statutes is for the Court. However, there is no ambiguity about this statute. It is obvious, even to a lay person, that the language "or other explosive or combustible substance" refers only to other substances equally as hazardous as benzine, gasoline, naphtha, nitroglycerine, dynamite or powder. Furthermore, that is the sole basis upon which the statute was argued to the jury by appellee's counsel. The evidentiary basis for this instruction was the testimony of the expert witnesses that this entire primer was more dangerous than straight naphtha, and equally as subject to flash fire or explosion as gasoline when above its flash point, naphtha and gasoline being two of the specifically named substances required by the statute to be labeled "Explosive." Our entire argument on the subject to the jury was to the effect that the primer was required to be labeled because in its entirety it was more dangerous than naphtha, and equally as hazardous as gasoline on warm days. We at no time contended to the jury that because the primer may have contained percentages of gasoline or naphtha it was within the statute.

Appellant's present argument was first urged upon the trial Court at the hearing on the motion for new trial. In denying the motion, the Court recognized

what we have said as to the nature of our argument to the jury, where the Court said,

> "And if I had it to do over again — of course hindsight is always better than foresight or one's judgment during the heat and rush of a jury trial — I would have instructed that the jury must find that the roof primer was of substantially similar character to the naphtha or gasoline specifically mentioned, but that was the basis on which the case was argued and, if there had been any argument to the contrary, that any combustible material would have to be labeled regardless of whether it were similar to or equally as dangerous as naphtha or gasoline mentioned in the statute, I certainly would have instructed the jury, but I didn't do so because the question didn't seem to be raised or the jury misled as to the application of the statute." (Tr. 325).

Elsewhere, appellant suggests that its counsel were "surprised and disappointed" at the giving of this instruction. We are unable to account for their surprise. Our contention that this primer should have been labeled in accordance with the provision of R. C.W. 70.74.300 was embraced in the pre-trial order (Tr. 21). The pre-trial order was entered April 1, 1954 and the trial of the case did not commence until April 26, 1954. Early in the trial, we submitted to the Court our requested instructions, among which was the instruction in question. During the forenoon of May 7, 1954, the trial judge advised counsel that he was going to give the requested instruction on the statute (Tr. 291-296). In the afternoon, there was further lengthy discussion between Court and counsel on other legal matters, followed by arguments to the jury, and it was not until late afternoon of May

7th that the Court instructed the jury (Tr. 296). Appellant had ample opportunity to do so, but requested no instruction of the Court interpreting this statute as it now contends the Court should have done. Furthermore, appellant had ample opportunity to conceive the idea that the statute needed interpreting so as to embody that reason in its exception to the instruction. The fact that appellant did not, in excepting to the instuction, suggest that it should have been interpreted, clearly indicates that its counsel did not then consider that any interpretation was needed, in view of the argument to the jury. We reiterate that this position is an afterthought, wholly lacking in merit.

b. Rule of Strict Construction (App. Br. pp. 34-35).

We agree with what appellant has to say here, but we fail to see how the rule of strict construction has any application. Again, the rule only applies in the construction of ambiguous statutes.

c. Appellant's Contention as to the Rule of Ejusdem Generis (App. Br. pp. 35-41).

We likewise agree with appellant's statement as to the rule of *ejusdem generis* and its application to this statute. What we have already said answers the argument at this point. Our argument to the jury as to the statute was upon the basis required by the rule of *ejusdem generis,* the jury was not misled and appellant made no mention of this rule in stating its reasons for its exception to the instruction.

We have read with interest what appellant has to say as to the great changes which have taken place in the petroleum industry, but we do not understand that benzine, gasoline or naphtha have become any less dangerous through the years or that the reasons why the buying public needs to be warned of the hidden presence of these or similar substances within containers is any less compelling now than when this statute was enacted. Appellant asks why kerosene was not included by the legislature in the substances required to be labeled. The reason, of course, is that kerosene is relatively safe, having flash points above 150° F. (Tr. 140, Ex. 27).

We quite agree that nowadays a container labeled "Gasoline" would be known to anyone to be dangerous, but we fail to see how that has anything to do with the situation as to a container labeled "Primer." Our whole position was and is that this primer is of the same nature and at least equally as dangerous as naphtha and gasoline at normally experienced temperatures and, under the rule of *ejusdem generis*, is therefore within the statute.

d. The Contention that the Statute Has Never Been Treated by the Law Enforcement Officers of the State as Applicable to Roof Primers (App. Br. pp. 40-44).

Basically appellant relies at this point upon the off-hand observation of the trial Judge that this statute is perhaps obsolete. There is no basis in the evidence or in any authority for such a conclusion. The stat-

ute has been included in all codifications of the Washington statute, including the Revised Code of 1951. The authority for the 1951 codification is to be found in §1.08.015 of the Revised Code of Washington, and in that section the revisor was charged with the duty to "(m) Strike provisions manifestly obsolete." Notwithstanding that legislative directive to the codifier, this statute was embraced within the code.

There is no validity in the argument that the statute is not enforced or observed. First of all, there is no evidence to that effect. Also, we take the liberty of going outside the record, as has appellant, to state our knowledge that the statute is observed by reputable manufacturers. We do not know upon what basis appellant is able to state that neither the Attorney General nor any of the 39 County Prosecutors have ever considered that this statute covered commercial products such as roof primers. We are quite certain that appellant's counsel has not undertaken the staggering task of reviewing the files of the 39 County Prosecutors and the Attorney General for the past 45 years. Likewise, we fail to see the significance in the fact, if it is a fact, that the Attorney General has never been called upon to construe or give an opinion concerning the statute, nor do we see the significance of the fact that the Supreme Court of Washington has not been called upon to construe this statute, as there may be countless cases which have never been appealed.

Appellant also suggests that we were unable to discover a single can of roof coating, primer, paint or

similar product that had ever been labeled in compliance with this statute. We do not know on what basis appellant has reached the conclusion that we made any effort to do so, which we did not. We did, however, quickly obtain in the Spokane market the roofing products of 4 reputable manufacturers, all of which contained true warnings equally as effective as the term, "Explosive," and represented a *de facto* compliance, at least, with the public policy of this state as expressed in the statute.

We submit that the statute in question was applicable and that the Court properly submitted to the jury for determination whether this primer, because of the testimony that it was more dangerous than naphtha, and as dangerous as gasoline, was a substance required to be labeled in accordance with the statute. In fact, we could justifiably contend that the Court should have ruled as a matter of law that the primer was required to be labeled "Explosive." There was no conflict in the evidence. It was conceded that the primer had a flash point between 80° and 100° F., which was within the range of naphtha.

CONCLUSION

We respectfully urge the Court to refer to and review the entire record in this case rather than to rely upon appellant's statements as to the evidence. We believe that it will be manifest to the Court, upon so doing, that appellant was grossly negligent and

totally oblivious to the safety of the public in failing to affix warning labels to this product. We think it will be equally obvious from the sales literature of appellant, which is among the exhibits, that its failure to so warn the public was coldly calculated so as to not adversely affect the saleability of its product and to create the false impression that its product was fireproof. We further believe that it is most evident that, had appellant placed a warning label on the barrels, this litigation would never have arisen, for there would have been no explosion and fire. In any event, we submit that the issues were for the jury and that the judgment should be affirmed.

Respectfully submitted,

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